FILED

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No. 97-105 JUL 17 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

BOARD of ZONING APPEALS of the CITY of VIRGINIA BEACH; ADAMS OUTDOOR ADVERTISING,

Petitioners,

v.

PATRICK A. JANEZECK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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David N. Anthony
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43 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE SUPREME COURT OF VIRGINIA ERRED IN REFUSING TO REVERSE THE TRIAL COURT'S DECISION VACATING ADAMS' VARIANCES, WHERE THE VARIANCES WERE GRANTED IN ORDER TO PREVENT THE CONFISCATION AND OUTRIGHT LOSS OF ADAMS' PROPERTY RIGHTS.

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CITATIONS OF THE OFFICIAL OPINIONS AND ORDERS

The order of the Supreme Court of Virginia denying Adams Outdoor Advertising's petition for rehearing, entered April 18, 1997, the order from which an appeal is taken, is reprinted at Appendix (hereafter "App."), pp. 1.

The order of the Supreme Court refusing Adams Outdoor Advertising's initial appeal entered on February 25, 1997, is reprinted at App., pp. 2.

Order, dated May 2, 1997 of the Circuit Court of the City of Virginia Beach denying the City of Virginia Beach's motion for summary judgment and continuing the matter generally until the Supreme Court rules or until November 7, 1997, is reprinted at App., pp. 13 through 14.

The final order, dated September 5, 1996 of the Circuit Court of the City of Virginia Beach denying Adams Outdoor Advertising a variance with respect to the billboards in dispute is reprinted at App., pp. 3 through 5.

The order of the Circuit Court of the City of Virginia Beach of October 11, 1995, incorporating the court's record in Janezeck v. Board of Zoning Appeals, CL97-2096; Janezeck v. Board of Zoning Appeals, CL91-2036; and, Commonwealth Transportation Commissioner v. Adams Outdoor Limited Partnership, CL88-3249, is reprinted at App., pp. 6 through 7. The foregoing order represented a stipulation between the parties.

The final order of the Circuit Court of the City of Virginia Beach invalidating the Certificates Nos. C-33917 and C-33918, entered on December 9, 1994, is reprinted at App., pp. 11 through 12.

BASIS FOR JURISDICTION

The Supreme Court of Virginia denied the Petition for Rehearing filed by Appellants, Board of Zoning Appeals of the City of Virginia Beach and Adams Outdoor Advertising, Inc. (collectively, "Adams"), on April 18, 1997. This petition is filed within the 90-day period of time required under Rule 13 of the Rules of the United States Supreme Court. Additionally, consistent with Rule 10 of the Rules of the United States Supreme Court, the federal issues decided by the Supreme Court of Virginia, a state court of last resort, have not been specifically addressed by this Court requiring exercise of this Court's supervisory power.

LAW OF THE CASE

The Fifth Amendment provides that private property may not be taken by the federal government without just compensation. The Fifth Amendment states that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

This prohibition applies equally to the states through the Fourteenth Amendment which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

Adams is lawfully engaged in the outdoor advertising business, and this case involves two billboards which have been maintained for many decades by Adams on Virginia Beach Boulevard in the City of Virginia Beach, Virginia. In each instance Adams was a tenant renting space from the underlying landowner. The billboards were in full compliance with the law until 1988, when the City of Virginia Beach enacted an ordinance prohibiting any "new billboards."

Meanwhile, in 1987 the Virginia Department of Transportation (VDOT) decided to widen Virginia Beach Boulevard. Since the billboards lay in the path of the road widening, VDOT demanded that Adams immediately remove its billboards. Fortunately, Adams was able to work

out a relocation of the billboards on the same parcels to the landlords' satisfaction.

Adams then applied to the Board of Zoning Appeals of the City of Virginia Beach (BZA) for a relocation permit, which was granted over the objection of the Zoning Administrator, and the billboards were relocated out of the VDOT right of way. The City then appealed to the Circuit Court of the City of Virginia Beach (the state court of record), which reversed the BZA, holding that the applicable ordinance did not permit relocation under the circumstances.[1]

Next, Adams applied to the BZA for variances, asserting a hardship under the circumstances. The BZA granted the variances, and once again the City appealed to the Circuit Court. Once again, the court reversed the BZA, ruling in effect that Adams did not suffer the requisite hardship.[2]

Meanwhile, VDOT had filed a separate condemnation proceeding against Adams relative to the billboards, which would theoretically have provided compensation to Adams.[3] However, while that suit was pending, the Supreme Court of Virginia ruled that a billboard tenant was not entitled to compensation from the condemnor in eminent domain.[4] Based on that decision, VDOT subsequently filed a motion to invalidate the condemnation

---

[1] Janezeck v. Board of Zoning Appeals, (CL87-2096).

[2] The Virginia statute, Code of Virginia (1950) § 15.1-495, requires that in order to obtain a variance the landowner must prove "a clearly demonstrable hardship approaching confiscation."

[3] Commonwealth Transp. Comm'r v. Adams, (Law No. CL88-3249). It should be noted that VDOT had previously filed, and settled, condemnation actions against Adams' landlords. Adams was not named as a party to either action. See Commonwealth Transp. Comm'r v. Morrison, (CL88-213) and Commonwealth Transp. Comm'r v. J.&S, (CL86-2710).

[4] Lamar v. City of Richmond, 241 Va. 346, 402 S.E.2d 31 (1991).

proceedings on the ground of Adams' status as tenant. The motion was granted by the state court, which held, consistent with Lamar, that Adams was not entitled to compensation.

The effect of this was that Adams faced the following obstacles: (1) the forced relocation of its billboards by the highway widening; (2) a court ruling that it could not legally relocate as a matter of right; (3) a local ordinance forbidding any "new billboards;" and (4) disentitlement to compensation in condemnation by reason of its tenant status.

This was the background which existed when Adams filed the variance applications which are the subject of this appeal. Faced with no other alternative to the outright loss of its billboards, Adams again filed for variances with the BZA. That body appreciated Adams' plight and unanimously granted the variances on February 15, 1995.[5] In granting the variances, the BZA specifically found that all the requisites of the statute had been satisfied.

Once again, however, the City appealed to the Circuit Court,[6] where Adams argued that the denial of variances, under these circumstances, would amount to an unconstitutional taking. The trial court rejected this argument, and set aside the variances. The Supreme Court of Virginia affirmed this decision, and has denied Adams' petition for rehearing. Adams requests that this Court review the case upon its Petition for a Writ of Certiorari.

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[5] Adams' earlier variance request occurred in 1991. Local law permits renewed variance applications after the expiration of twelve months. Code of Virginia (1950) § 15.1-496; Virginia Beach City Code § 106(B).

[6] Janezeck v. Board of Zoning Appeals, (CL95-670), which is the subject of this appeal.

ARGUMENT

The Supreme Court of Virginia erred in refusing to reverse the trial court's decision vacating Adams' variances, where the variances were granted in order to prevent the confiscation and outright loss of Adams' property rights.

Like most states, Virginia has enacted a variance statute designed to alleviate "hardships" on landowners "approaching confiscation." Code of Virginia (1950) § 15.1-495. Naturally, the degree of "hardship" will vary from case to case. In this case, however, the hardship not only "approaches" confiscation: it amounts to confiscation. Adams found itself caught in the regulatory pincers of two governmental entities: the City (which made a political decision to ban billboards) and VDOT (which under Virginia law owes no compensation to a billboard tenant). Faced with the ultimate "hardship" in the loss of its property, Adams was a prime candidate for a variance, and the denial of this relief created a confiscation rather than preventing one.

While it is true that the issuance of land use permits such as variances is a local governmental matter which arises from the traditional police power, it has also been held that such power can be abused. If the power is exercised in a way that takes private property without compensation, it is subject to constitutional challenge. See, e.g., Agins v. Tiburon, 447 U.S. 255, 260 (1980) (holding that where a land use regulation deprives the owner of economically viable use of his land without providing just compensation, this constitutes an unconstitutional "taking" under the Fifth Amendment); Metropolitan Bd. of Zoning Appeals v. Gateway Corp., 256 Ind. 326, 268 N.E.2d 736 (1971) (holding that where denial of variance left the appellee with no use for his property, this constituted a violation of the appellee's rights under the state and federal constitutions);

Sibley v. Inhabitants of Town of Wells, 462 A.2d 27 (Me. 1983) (noting in the context of the denial of a variance that "[n]o taking exists unless the property has been rendered substantially useless"); Mayer v. Board of Adjustment of Town of Montclair, 56 N.J. Super. 296, 152 A.2d 860 (1959) (noting that where zoning circumstances leave a property without practical use, denial of a variance would constitute a taking without due process), rev'd on other grounds, 32 N.J. 130, 160 A.2d 30 (1960). The denial of the variance will not only render Adams' property "substantially useless," it will destroy the use altogether.

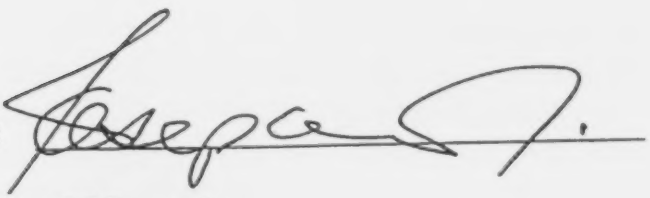
Where a land use regulation's effect is to destroy property rights without compensation, the denial of a variance can rise to the level of an impermissible taking. E.g., Agins, 447 U.S. at 260; Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959) (holding that where present zoning rendered land without feasible economic use, and where a variance was denied, this constituted an a taking without due process, resulting in confiscation). Adams' status as a tenant does not affect the applicability of this principle. See, e.g., Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976) (noting that "[o]rdinarily, a leasehold interest has a compensable value . . ."); Ward v. Downtown Dev. Auth., 786 F.2d 1526, 1528-29 (11th Cir. 1986) (noting that tenants held compensable property interest for purposes of the Fifth Amendment); Devines v. Maier, 665 F.2d 138 (7th Cir. 1981) (recognizing that lessees hold property interests protected by the Fifth Amendment), cert. denied, 469 U.S. 836 (1984).

This is such a case. Here the BZA, charged with the responsibility of promoting and harmonizing the exercise of property rights, was presented with a clear opportunity to prevent the literal elimination of Adams' property rights. The Board acted properly in granting the variances. By overturning that action, the state court worked a forfeiture, without compensation, of Adams' substantial property rights.

CONCLUSION

For the foregoing reasons, petitioner Adams Outdoor Advertising, Inc. respectfully requests that the United States Supreme Court grant this Petition for a Writ of Certiorari.

ADAMS OUTDOOR ADVERTISING, INC.

By: 

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Counsel for Petitioner

No. _____

In The

Supreme Court of the United States

October Term 1996

BOARD of ZONING APPEALS of the CITY of VIRGINIA BEACH; ADAMS OUTDOOR ADVERTISING,

Petitioners,

v.

PATRICK A. JANEZECK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

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(Law No. CL95-670)
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In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 18th *day of* April, 1997.

Board of Zoning Appeals of the
City of Virginia Beach, et al.,
Appellants,

against

Patrick A. Janezeck,
Appellee.

Record No. 962389
Circuit Court No. CL95-670
Entered: April 18, 1997

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 25th day of February, 1997 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:
/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 25th *day of* February, 1997.

Board of Zoning Appeals of the
City of Virginia Beach, et al., Appellants,

against

Patrick A. Janezeck, Appellee.

Record No. 962389
Circuit Court No. CL95-670
Entered: February 25, 1997

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:
/s/_____
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

PATRICK A. JANEZECK,
Petitioner,
v.
BOARD OF ZONING APPEALS OF
THE CITY OF VIRGINIA BEACH,
and
ADAMS OUTDOOR ADVERTISING, INC.,
Respondents.

LAW NO. CL95-670

ENTERED: September 5, 1996

FINAL ORDER

THIS CAUSE came to be heard upon the Writ of Certiorari calling up for review the decision of the Respondent Board of Zoning Appeals (hereinafter the "Board") made on the 15th day of February, 1995, wherein the Board granted, upon the applications of the Respondent Adams Outdoor Advertising, Inc. (hereinafter "Adams"), variances from the provisions of Section 216 of the City Zoning Ordinance so as to allow two billboards located at 2500 Virginia Beach Boulevard and 2509 Virginia Beach Boulevard, respectively, to remain in place; upon the Return of the Board; and upon the Amended Answer of Adams.

Both the Respondent Board of Zoning Appeals and the intervening Respondent Adams, whose property rights were affected by the subject variances, urged the Court that Adams' status as billboard tenant precluded its right to condemnation compensation from the Virginia Department of Transportation; that accordingly, without the granting of a variance its property rights would be extinguished and

essentially confiscated; and that such deprivation of property rights would constitute an impermissible taking violative of the federal and state constitutions.

And the Court having given mature consideration to the record of proceedings before the Board, including, by agreement of the parties, the record in the prior related cases styled *Patrick A. Janezeck v. Board of Zoning Appeals,* at Law No. CL87-2096, *Patrick A. Janezeck v. Board of Zoning Appeals,* at Law No. CL91-2036, and *Commonwealth Transportation Commissioner v. Adams Outdoor Limited Partnership,* CL88-3249, the additional evidence submitted by Adams, and the briefs and argument of the parties, the Court rejects the aforesaid contentions by Adams, and is of the opinion that the decision of the Board was plainly wrong and contrary to the purpose and intent of the City Zoning Ordinance and was based upon the application of erroneous principles of law, in that the application of the City Zoning Ordinance provisions requiring the removal of the subject billboards did not cause an undue hardship upon Adams, within the meaning of Virginia Code Section 15.1-495; that Adams' contention that a denial of the variances results in an unconstitutional taking is without merit; and that the condition or situation of the property concerned is not of so general and recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the City Zoning Ordinance, it is

ADJUDGED, ORDERED and DECREED, that the aforesaid decision of the Board be, and hereby is, REVERSED, and that the applications of Adams for the subject variances be, and hereby are, DENIED, to which the Respondents hereby object and except.

The Respondents have indicated their intention to appeal the decision of this Court. Accordingly, the execution and effect of this Order shall be suspended and stayed upon the filing by Adams of an appeal bond or irrevocable letter of credit in the amount of $500 pursuant to Code Section 8.01-

676.1, and upon the filing of such security, the aforesaid suspension and stay shall remain in effect throughout the timely prosecution of such appeal, to which the Petitioner hereby excepts and objects.

ENTER:

_____

The Honorable Edward W. Hanson, Jr.

I ASK FOR THIS:

/s/_____p.q.

Counsel for the Petitioner

SEEN, OBJECTED AND EXCEPTED TO:

/s/_____p.d.

Counsel for the Respondents

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

PATRICK A. JANEZECK,
Zoning Administration Officer
of the City of Virginia Beach,

Petitioner,

v.

BOARD OF ZONING APPEALS
OF THE CITY OF VIRGINIA BEACH

Defendant.

LAW NO. CL95-670

ENTERED: 10/11/95

ORDER

This action came on to be heard upon the representations of counsel and a stipulation between the parties.

By agreement of counsel, the following items are ORDERED to be made a part of the record in addition to matters of record in this action, and will be considered in connection with the issues herein:

1. The Court's record in Janezeck v. Board of Zoning Appeals, CL87-2096.

2. The Court's record in Janezeck v. Board of Zoning Appeals, CL91-2036.

3. This Court's record in Commonwealth Transportation Commissioner v. Adams Outdoor Limited Partnership, CL88-3249.

It further appearing to the Court that legal issues are involved as to which the parties desire to file briefs, the following briefing schedule is established:

The Plaintiff shall file its opening brief on or before November 1, 1995, and the Defendant shall respond on or before November 22, 1995. Thereafter, the Plaintiff may elect to file a rebuttal brief on or before December 5, 1995. Counsel are then directed to contact the Court to schedule a time for oral argument and final disposition of this case.

_____
Judge

SEEN AND AGREED TO:

/s/_____
William M. Macali

/s/_____
Joseph L. Lyle, Jr.
Counsel for Adams Outdoor
Advertising, Inc.

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH TRANSPORTATION
COMMISSIONER OF VIRGINIA,
Petitioner,
v.
ADAMS OUTDOOR LIMITED
PARTNERSHIP,
Respondent.

AT LAW NO.: CL88-3249

DATED: October 4, 1994

MEMORANDUM IN SUPPORT OF
PETITION FOR LEAVE TO INVALIDATE
CERTIFICATE OF TAKE NO. C-33917
AND C-33918

NOW COMES the Petitioner, Commonwealth Transportation Commissioner of Virginia, by counsel, and submits the following authority in support of its Petition for Leave to Invalidate Certificate of Take No. C-33917 and C-33918 heretofore filed, as follows.

In The Lamar Corporation, et al v. City of Richmond, 241 Va. 346 (1991), the Supreme Court of Virginia held that where "the primary issue" is "whether a lessee, who erects a billboard on the property he leases, has an interest in either the billboard or the underlying property which entitles him to a separate condemnation proceeding to ascertain just compensation when the underlying leasehold property is condemned" ... the lessee is not a proper party to the condemnation proceeding, but rather;

"{T}he proper course is to ascertain the entire

> compensation as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights." Lamar at 350, citing Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 369, 137 S.E. 458, 463, (1927),

The Court in Lamar further stated,

> Although a lessee, in condemnation proceedings, may suffer a taking of, or damage to, his leasehold, for which he is entitled to compensation from the condemnation award, neither our prior decisions nor the authorities Lamar and Whiteco city support their contention that a lessee has a separate, condemnable interest entitling him to a separate condemnation proceeding. Lamar at 350.

The Lamar case is directly on point with the instant case and the certificates herein should be invalidated as the lessee's sole remedy in the proceedings is against the landowner for apportionment of compensation received by the landlord for the taking.

Respectfully submitted,

COMMONWEALTH TRANSPORTATION COMMISSIONER OF VIRGINIA,

By: */s/*_____
Marshall A. Winslow, Jr.

Carter R. Anderson, Jr.
Marshall A. Winslow, Jr.
Anderson & Winslow, P.C.
Signet Bank Building, Suite 200
675 Lynnhaven Parkway
Virginia Beach, Virginia 23452
804/463-7700
Facsimile 804/463-3100

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum in Support of Petition to Invalidate Certificates of Take was mailed or delivered to Joseph L. Lyle, Esquire, KAUFMAN & CANOLES, P.C., 700 Pavilion Center, Post Office Box 626, Virginia Beach, Virginia, 23451 this 4th day of October, 1994.

*/s/*_____
Marshall A. Winslow, Jr.

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH TRANSPORTATION
COMMISSIONER OF VIRGINIA,
Petitioner,

v.

ADAMS OUTDOOR LIMITED
PARTNERSHIP,
Respondent.

AT LAW NO.: CL88-3249 (Parcels 344, 347, & 438)

ENTERED: December 9, 1994

FINAL ORDER

THIS ACTION came on to be heard, upon the motion of the Petitioner, Commonwealth Transportation Commissioner of Virginia, by counsel, to invalidate Certificates of take Nos. C-33917 and C-33918; and the matter was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the Respondent is not entitled to compensation herein;

It is therefore ORDERED that Petitioner's motion to invalidate Certificates Nos. C-33917 and C-33918 be and it is hereby granted, and said certificates are hereby invalidated. The Court having found that the Respondent is not entitled to compensation, the Respondent is directed to reimburse the Petitioner in the amount of Thirty-Two Thousand Seventy-Five Dollars and 12/100, $32,075.12.

_____
JUDGE

WE ASK FOR THIS:

/s/_____,p.q.
Carter R. Anderson, Jr.

_____,p.d.
Joseph L. Lyle, Jr.

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH

PATRICK A. JANEZECK,
Zoning Administration Officer
of the City of Virginia Beach,
Complainant,

v.

ADAMS OUTDOOR ADVERTISING, INC.,
Respondent.

CH91-512

ORDER

THIS MATTER came on to be heard on the 2nd day of May, 1997, upon the Plaintiff's motion for summary judgment; and the matter was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the Defendant intends to apply to the United States Supreme Court for a writ of certiorari to review the judgment of the Supreme Court, and for the reasons stated from the bench on May 2, 1997, the Court does hereby continue this matter until Friday, November 7, 1997, at which time the Court will consider the matter further. The Court further finds that should the petition for certiorari be denied or if the Virginia Supreme Court's judgment is otherwise affirmed by the United States Supreme Court, then the Plaintiff's motion for summary judgment will be granted without the need for further evidentiary hearing or trial.

In light of the foregoing ruling, this case is hereby removed from the Court's trial docket on July 30, 1997.

ENTER:

_____

JUDGE

SEEN:

/s/_____

Joseph L. Lyle, Jr, counsel for Respondent

SEEN/OBJECTED AND EXCEPTED TO:

/s/_____

William M. Macali, counsel for Complainant

[AMENDMENT V]

[*Rights of accused in Criminal Proceedings*]

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT XIV]

Section 1.

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the united states and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code Section 15.1-495. Powers and duties of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto.

2. To authorize upon appeal or original application in specific cases such variance as defined in Section 15.1-430 (p) from the terms of the ordinance as will not be contrary to the public interest, when owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship.

b. That such hardship is not shared generally by other properties in the same zoning district and the same vicinity.

c. That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

No such variance shall be authorized except after notice and hearing as required by Section 15.1-431. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

3. To hear and decide appeals from the decision of the zoning administrator. No such appeal shall be heard except after notice and hearing as provided by Section 15.1-431. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street, or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by any such question, and after public hearing with the notice as required by Section 15.1-431, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property.

6. To hear and decide applications for special exceptions as may be authorized by the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted after notice and hearing as provided by Section 15.1-431. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception of the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by

Section 15.1-431. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. (Code 1950, Sections 15-831, 15-850; Code 1950, Section 15-968.9; 1950, p. 176, 1962, c. 407; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555)

Virginia Code Section 15.1-496. Applications for special exceptions and variances.

Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the zoning administrator in accordance with rules adopted by the board. The application and accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board. No such special exceptions or variances shall be authorized except after notice and hearing as required by Section 15.1-431. The zoning administrator shall also transmit a copy of the application to the local commission which may send a recommendation to the board or appear as a party at the hearing. The governing body of any county, city or town may provide by ordinance that substantially the same application will not be considered by the board within a specified period, not exceeding one year. (Code 1950, Sections 15-828 to 15-830, 15-832, 15-833, 15-850; Code 1950, Section 15-968.10; 1950, p. 176; 1962, c. 407; 1966, c. 256; 1975, cc. 521, 641; 1989, c. 407.)

Zoning Regulation Sec. 105. Nonconformity.

(a) Any otherwise lawful use, structure, or condition of use which existed in conformity to all applicable zoning provisions before this ordinance was adopted or amended but which does not conform to the provisions of this ordinance as a result of its adoption or amendment shall be deemed a nonconformity.

(b) Intent. It is the intent of this ordinance to allow nonconformities to continue until they are removed, but not to allow them to become enlarged, expanded, extended, or relocated except upon resolution of city council as provided for in this section, and not to allow them to be used as ground for adding other structures or uses prohibited elsewhere in the same district.

(c) Continuation. A nonconformity may continue provided that it remains otherwise lawful, subject to the provisions set forth in this section. However, no nonconformity shall continue if it ceases for any reason for a period of more than two (2) years.

(d) Enlargement or extension of nonconformity. No nonconforming use shall be increased in magnitude. No nonconforming use shall be enlarged or extended to cover a greater land area that was occupied by the nonconformity on the effective date of this ordinance or amendment thereto. No nonconforming use shall be moved in whole or in part to any other portion of the lot, parcel, or structure not occupied by the nonconformity on the effective date of this ordinance or amendment thereto, and no nonconforming structure shall be moved at all except to come into compliance with the terms of this ordinance. No nonconforming structure shall be enlarged, extended, reconstructed, or structurally altered, if the effect is to increase the nonconformity. As an exception to the above, any condition of development prohibited by this section may be permitted by resolution of the city council based upon its finding that the proposed condition is equally appropriate or more appropriate to the

district than is the existing nonconformity. City council may attach such conditions and safeguards to its approval as it deems necessary to fulfill the purposes of the ordinance. Applications for the enlargement, extension or relocation of a nonconforming use or structure shall be filed with the planning director. The application shall be accompanied by a fee of one hundred twenty-five dollars ($125.00) to cover the cost of publication of notice of public hearing and processing. Notice shall be given as provided by Section 15.1-431 of the Code of Virginia. A sign shall be posted on the site in accordance with the requirements of section 108 of this ordinance.

(e) Conversion of a nonconforming use to another use. No nonconforming use shall be converted to another use which does not conform to this ordinance except upon a resolution of the city council approving such conversion, based upon its finding that the proposed use is equally appropriate or more appropriate to the district than is the existing nonconforming use. In the resolution permitting such change, the city council may attach such conditions and safeguards to its approval as it deems necessary to fulfill the purposes of this ordinance. When any nonconforming use is converted to another use, the new use and accompanying conditions of development shall conform to the provisions of this ordinance in each respect that the existing use conforms, and in any instance where the existing use does not conform to those provisions, the new use shall not be more deficient. Any use approved by city council shall thereafter be subject to the provisions of this section. Applications for the conversion of a nonconforming use or structure shall be filed with the planning director. The application shall be accompanied by a fee of one hundred twenty-five dollars ($125.00) to cover the cost of publication of notice of public hearing and processing. Notice shall be given as provided by Section 15.1-431 of the Code of Virginia. A sign shall be

posted on the site in accordance with the requirements of section 108 of this ordinance.

(f) Damage or destruction involving nonconformites. Any structure of condition of development which is, houses, or is related to a nonconformity may, if involuntarily damaged or destroyed, be reconstructed or restored to its prior condition and location within two (2) years of its being damaged or destroyed, and the nonconformity may continue as before. If it is not reconstructed or restored within two (2) years, then any future construction or reconstruction on, or use of, the affected lot shall be in conformance with the provisions of this ordinance.

(g) Location of uses and structure on lost not meeting minimum requirements. Any conforming principal or accessory use or conforming structure housing such use may be enlarged, extended, constructed, located, or moved on any lot created prior to the effective date of this ordinance regardless of the size or dimensions of such lot, provided that other requirements of this ordinance are met. However, in the case of any lot created or rezoned upon petition on behalf of the property owner on or after the above date, only those uses and structures shall be located on the lot for which the lot meets the minimum lot requirements in the applicable zoning district. Any lot not meeting the applicable size or dimension requirements due to governmental action taken on or after the effective date of this ordinance shall have the same rights of development as before said governmental action took place.

(h) Buildings being planned or under construction. Nothing herein contained shall require any change in the plans for construction of any project, or part thereof, for which an active use permit, valid building permit, current approved preliminary subdivision plat or certificate of occupancy was lawfully issued prior to the

effective date of this ordinance, or of any amendment thereto.

Zoning Regulation Sec. 106. Appeals and Variances.

(a) The board of zoning shall hear and decide appeals from any order, requirement, decision, or determination or enforcement of this ordinance. In addition thereto, the board shall have such other powers and duties as are set forth in Section 15.1-495 of the Code of Virginia; provided, however, that the board shall have no authority to hear and decide applications for conditional use permits.

(b) The membership, organization and procedures of the board of zoning appeals shall be as set forth in Section 15.1-494 through 15.1-497 of the Code of Virginia, as amended. In the event the board denies an application for a variance, substantially the same application shall not be considered by the board for a period of one (1) year from the date of denial.

(c) Every application to the board of zoning appeals shall be accompanied by a fee of one hundred fifty dollars ($150.00), which shall be applied to the costs of advertising and expenses incidental to the processing of the application. Each zoning lot upon which a variance is requested shall be the subject of a separate application and a separate fee; provided, however, that variances from the setback and landscaping provisions of section 201(e)(1), pertaining to fences and walls, may be the subject of a single application and fee where the following conditions are met:

(1) The lots upon which the variance is requested are contiguous lots within a single subdivision block, as shown on the recorded plat of the subdivision in which the lots are located;

(2) The fence or fences which are the subject of the variance are located wholly upon property owned by a bona fide homeowners'

association created by legal instrument recorded in the office of the clerk of the circuit court, or upon which there is a recorded perpetual easement allowing such homeowners' association, or the members thereof, to construct and maintain a fence upon such property;

(3) Such fence or fences are owned by the homeowners' association; and

(4) The individual signing the application certifies to the zoning administrator, in writing, that he or she is vested with the authority to act on behalf of the homeowners' association in the matter and that such association has authorized, in the manner prescribed by its by-laws or other instrument, the filing of the application.

(Ord. No. 1929, 10-23-89; Ord. No. 1970, 6-11-90; Ord. No. 2063, 5-14-91; Ord. No. 2379, 3-26-96)

Zoning Regulation Sec. 215. Nonconforming signs.

(a) Notwithstanding the provisions of section 105(f) of the ordinance, no nonconforming sign shall be structurally altered, enlarged, moved or replaced, whether voluntarily or by reason of involuntary damage to or destruction of such sign, unless such sign is brought into compliance with the provisions of this ordinance. No nonconforming sign shall be repaired at a cost in excess of fifty (50) percent of its original cost unless such sign is caused to comply with the provisions of this ordinance. Any nonconforming sign which is not maintained continuously in good repair, and any nonconforming sign which is abandoned for a period of two (2) years shall be removed. For purposes of this section, a sign shall be deemed to be abandoned if no copy or advertising matter is exhibited on the advertising faces of such sign

(b) Notwithstanding the provisions of subsection (a) hereof, the zoning administrator may, at his discretion

and with the concurrence of the director of planning, vary the requirements of this ordinance pertaining to the allowed number of signs, total sign area, individual sign area, number of freestanding signs and height of freestanding signs in cases in which the owner of a sign or other proper party desires to repair, replace, relocate or structurally alter an existing nonconforming sign or combination of signs and such repair, replacement, relocation or structural alteration is not required, or has not been made necessary, by reason of damage, destruction, deterioration, disrepair or noncompliance with applicable building code standards or any of the provisions of this ordinance; provided, however, that the regulations set forth in subsection (c) and (d) of section 944.1 of this ordinance shall not be so varied.

(c) Nothing in this section shall be construed to limit or otherwise impair the right of any proper party to apply to the board of zoning appeals for a variance from any of the sign regulations set forth in this ordinance. (Ord. No. 1775, 5-9-88; Ord. No. 2152, 6-23-92)

Zoning Regulation Sec. 216. Outdoor advertising structures, billboards, signboards and poster panels.

(a) No new billboards shall be erected within the city limits, effective immediately. All existing billboards shall be governed by the provisions of section 215 of this ordinance. No billboard heretofore erected shall be located, in whole or in part, upon improved property.

(b) No billboard shall be located within five hundred (500) feet of an interchange, or intersection at grade, on any highway, interstate or city council designated expressway (measured along the highway, interstate or expressway to the nearest point to the beginning or ending of pavement widening at the exit from or entrance to the main travelway). On all other streets, no billboards shall be located within two hundred (200) feet of any right-of-way of

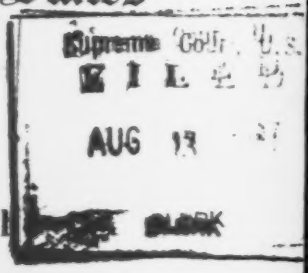
any underpass, overpass, bridge or tunnel or a plaza serving such facility.

(c) No billboard shall be closer than fifty (50) feet to any property line nor located closer than six hundred sixty (660) feet to the right-of-way line of any interstate or expressway designated by city council, nor closer than twenty-five (25) feet to the right-of-way of any other street. However, no billboard shall be located within two hundred (200) feet of any established residential or apartment zoning district. No billboard shall be located upon any lot having frontage of less than two hundred (200) feet and an area of less than ten thousand (10,000) square feet. (Ord. No. 1775, 5-9-88)

No. 97-105

In The Supreme Court Of The United States

OCTOBER TERM 1996



BOARD of ZONING APPEALS of th CITY of VIRGINIA BEACH; ADAMS OUTDOOR ADVERTISING,

Petitioners,

v.

PATRICK A. JANEZECK,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

I. **Does the Petition for Writ of Certiorari present a question cognizable by this Court?**

II. **Does the denial of the subject variances constitute an unconstitutional taking of property without just compensation?**

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BASIS FOR JURISDICTION IN THIS COURT

The Respondent disputes the basis for jurisdiction asserted by Adams. While Adams states that the case warrants the exercise of the Court's supervisory power under Rule 10 (a), none of the reasons set forth in the rule as calling for the exercise of that power apply, and no other reason appears for the exercise of jurisdiction by the Court. This case is an ordinary local zoning dispute presenting no compelling reason for the granting of a writ of certiorari, as required by Rule 10, and does not even present a cognizable question for review.

STATEMENT OF THE CASE

The Statement of Facts contained in the Petition for Writ of Certiorari misstates the holding of *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991). *Lamar* does not hold that the owner of a billboard located on leased property is not entitled to compensation in an eminent domain proceeding; to the contrary, it clearly recognizes that the billboard's owner *is* entitled to compensation. The case holds merely that the billboard owner is not entitled to a *separate proceeding* to determine the compensation for his interest in the property condemned.

Adams fails to mention that it fully acquiesced in the dismissal of the condemnation case involving its billboards by endorsing, as agreed, the dismissal order and that it

failed to appeal the dismissal. Only after it agreed to the dismissal of the case did Adams apply for, and receive, variances allowing the billboards to remain in place.

ARGUMENT AND AUTHORITIES

I. The Petition for Writ of Certiorari does not present a question of law cognizable by this Court

The sole question presented for review is whether the subject variances should have been granted. That question is purely one of State law; as a result, this case is not one in which the Court may grant review under 28 U.S.C. §1257.

The granting or denial of variances in Virginia is exclusively the function of local boards of zoning appeals, Va. Code Ann. § 15.1-495 (Supp. 1996) and, upon appeal, Virginia courts of general jurisdiction. Va. Code Ann. § 15.1-497 (Supp. 1996). The decisional standards, which are set forth in Section 15.1-495, are exclusively State standards. A decision granting or denying a variance application is thus entirely a matter of State law.

Adams asks the Court only to review the question of whether the Virginia Supreme Court erred in affirming the trial court's denial of the subject variances. While Adams states, without support in the record, that the variances were initially granted by the Board of Zoning Appeals "to prevent the confiscation and outright loss of Adams' property rights," it does not ask the Court to determine

whether the ultimate denial of the variances was an unconstitutional taking of its property, and it does not assert that any other question of federal law is present in the case.[1] Accordingly, the case does not present for review any question cognizable by this court under 28 U.S.C. §1257.

II. The denial of the subject variances does not constitute an unconstitutional taking without just compensation.

Adams claims, in effect, that it was entitled to variances allowing it to keep its billboards because it was not compensated for their loss, even though it willingly gave up the right to seek compensation for them in State court.

Even if the issue of whether Adams has suffered an unconstitutional taking of its property were properly before the Court, no taking could be found on this record. Adams, which now complains of the uncompensated taking of its property, had a full and fair opportunity in State court to seek the compensation to which it was entitled for the condemnation of its billboards. As admitted by Adams, the Virginia Department of Transportation filed condemnation proceedings in 1988 in

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[1] In light of the fact that the record is utterly insufficient to allow the Court to decide whether there has been a taking of Adams's property, Adams could not in good faith even ask the Court to decide that question.

which the compensation due Adams was to be determined. It was not until 1994 that the order dismissing the condemnations was entered. During that entire period, Adams did not bring the cases to trial.

Adams protests to this Court, as it did to the trial court and the Supreme Court of Virginia, that the case of *Lamar Corp. v. City of Richmond*, 241 Va. 346, 402 S.E.2d 31 (1991), divested it of its right to compensation. That assertion greatly exaggerates the import of *Lamar*, which holds only that a billboard owner who is the tenant of the underlying fee is not entitled to a separate proceeding to determine compensation for the value of the billboards taken. It does not, nor under the most basic principles of constitutional law could it, stand for the proposition that a property owner is not entitled to compensation for the taking of its property.

Perhaps even more telling of the merits of Adams's petition is the fact that Adams *affirmatively agreed* to the dismissal of the condemnation cases in which the compensation for the loss of the billboards was to be determined. Petitioner's App. 11-12. It thus willingly gave up its right to seek compensation in State court. Having done so, it now complains that it is the victim of an uncompensated taking. That contention was roundly rejected by the trial court and the Virginia Supreme Court.

It may be anticipated that Adams will argue that, even if *Lamar* did not *expressly* divest it of the right to compensation for the loss of its billboards, it *effectively* did

so because the condemnation case involving the underlying realty had previously been decided. That argument, however, does nothing to change the facts that Adams agreed to the dismissal of the case, failed to appeal the dismissal, and failed to assert the principle that case decisions should not be applied retroactively so as to produce inequitable results. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.E.2d 296 (1971); *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984); *Fountain v. Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973). Adams's loss was patently self-inflicted, and it cannot now ask for redress of a grievance it has itself created. *See Steele v. Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

By William Matthew Macali

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APPENDIX

APPENDIX

Statutes of the United States

28 U.S.C. § 1257:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Virginia statutes

Virginia Code Section 15.1-497:

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the county or municipality, may present to the circuit court of the county or city a petition specifying the

grounds on which aggrieved within thirty days after the filing of the decision in the office of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board, unless it shall appear to the court that it acted in bad faith or with malice in making the decision appealed from. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the board may request that the court hear the matter on the question of whether the appeal was frivolous.